IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 725 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJUSINH UDESINH - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
None for Appellant,
MR.A.J.DESAI, ADDL.PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 17/11/2006

ORAL JUDGMENT

Learned Counsel, Mr.Pathan, appearing for the appellant was absent when the matter was called out. However, considering the settled legal position that

the Court after admitting the Criminal Appeal cannot dismiss the same for want of prosecution observing that nobody is present for the appellant-convict, the Court is supposed to pass order and dispose of the appeal on merits and therefore, I have heard Mr.Desai, learned A.P.P., for the respondent-State, who has taken me through the relevant part of the evidence oral as well as documentary.

2. The present appeal arises out of the judgment and order of the learned Special Judge, Ahmedabad City, passed in Special Criminal Case No.33 of 1989 on 18th November, 1989. The appellant came to be tried and found guilty for offence punishable under Section 7 of the Essential Commodities Act, 1955, so also, he was found guilty for violating the provision of Kerosene (Restriction on Use) Order, 1966 by the trial Court and came to be convicted therefor. The learned trial Judge after recording conviction and after hearing the accused on quantum of punishment, sentenced the accused-appellant to undergo Rigorous Imprisonment for 03 (three) months.

3. The facts of the case can be stated thus:-

4. The complainant was discharging his duty as Traffic Police Sub Inspector on 30th September, 1988 near Asarva Circle. At that time some other Police Officers, so also, the expert persons of Forensic Science Laboratory were also present with him. It is the case of the prosecution that at about 10:30 a.m. one rickshaw bearing Registration No.GQE 1457 came from eastern side which was emitting excessive smoke and therefore, it was intercepted by the complainant and rickshaw was stopped. Thereafter, the sample of fuel was taken from the fuel tank of the rickshaw by the Police in the presence of Panch. On preliminary analysis done by the F.S.L. persons, it was found that the kerosene was mixed with the fuel recovered from the tank of the rickshaw. Thereafter, the adequate sample of fuel was taken in a bottle from the tank of the rickshaw in a sealed bottle and signatures of the complainant and Panchwitnesses were also obtained. On detailed analysis, the expert of the F.S.L. found that the sample which was taken from the tank of rickshaw was mixed with kerosene-hydrocarbons. Thereafter, the Police arrested the accused. Offence was registered and case was investigated. Ultimately, the Investigating Agency, having found sufficient material to connect the accused-appellant with the crime, filed charge-sheet.

5. After considering the evidence led by the

prosecution, the Special Court came to a conclusion that the prosecution was successful in establishing charges levelled against the appellant and therefore, convicted the accused-appellant for the said offence by the impugned judgment dated 16th October, 1989 passed in Special Criminal Case No.33 of 1989. It is this judgment and order that has given rise to this appeal.

6. Learned Advocate for the appellant was not present. The Court had also not arranged for Counsel so that the accused can get the ample opportunity to defend himself. However, the record shows that the appellant-accused is the person responsible for not making arrangement for Advocate i.e. the defence Counsel. On the last minute when the witnesses are already kept present for examination, the Court cannot arrange for pleader. In such a case, can record the evidence and can think that witnesses can be recalled on request.

7. The trial Court ought to have considered the following aspects.

1. The basic allegation is that the accused was using the kerosene as fuel.
2. The evidence ultimately led by prosecution is that it was not a pure kerosene.
3. The accused was driving the auto-rickshaw but, there

is nothing on record to show which can be said to be the best evidence about the ownership of the rickshaw and it is not possible for this Court to accept that the accused himself is the owner of the rickshaw. The prosecution was supposed to establish this fact by producing documentary evidence in cogent and convincing manner.

4. The sample of fuel of about 375.0 Ml which sent for analysis was faint yellow coloured liquid and it was analyzed in three different ways. The report of Public Analyst (Exh.12) indicates of the three method adopted by the Senior Scientist which says that the contents of the glass bottle found to be mixture of petrol and kerosene hydrocarbons considering the presence of lubricating oil (emphasize supplied).

8. The ratio of the decision of the Bombay High Court in case of **Abdul Jabbar s/o Abdul Sattar Vs. State of Maharashtra, reported in 1995 CRI.L.J. 3446** would help the appellant-accused. In the case before the Bombay High Court, a truck driver was found using kerosene with diesel as fuel for driving the truck. In this cited decision ultimately the Court had focused on two main points.

1. There is no evidence that the accused was also the

owner of the truck. On the contrary, it was observed that he was a driver and not the owner of the truck and therefore, he cannot be held responsible for the fuel lying in the tank that was being consumed in the said truck.

2. The liquid was not a pure kerosene and it was a mixture with diesel and the probability that when the truck was fueled the diesel, he might have received an adulterated diesel mixed with kerosene. To rule out this probability some detailed investigation ought to have been carried out and it was not done so far in that case. The Offence complained of in the cited decision was that “on or about 19-11-1990 at about 10:30 a.m. on Washim by-pass road at Akola you were found putting kerosene oil in the diesel tank on truck No.MTV 2059, which was driven by you. Kerosene being an essential commodity you have committed breach of Kerosene (Restriction on Use) Control Order and thereby committed an offence under clause 3 punishable under clause 7 of the Essential Commodity Act.”

So in this cited decision the charge was that he was using kerosene and it was found that it was not kerosene but was mixture of kerosene with diesel.

9. In the present case, the F.S.L. Report (Exh.12) does not indicate the percentage of two different liquids that were found mixed while analyzing the sample and therefore, the scope of adulteration by the owner of the petrol pump is a possibility which cannot be ruled out. The learned trial Judge has failed to appreciate this aspect because there is no cross-examination of Panch Witnesses. The acts of the accused cannot link with the crime because the main documentary evidence i.e. Report of the F.S.L. (Exh.12) itself makes the case of the prosecution doubtful. In absence of cogent evidence that accused was seen by adding kerosene in the fuel tank or the percentage of the kerosene was very much high as compared to petrol found from the fuel tank, the accused cannot be held guilty for charge. It would be risky and improper for this Court to confirm the order of conviction and sentence passed by the learned trial Court in light of above cited decision of the Bombay High Court.

10. In the result, appeal is allowed. The judgment and order dated 16th October, 1989 rendered by the learned Special Judge, Ahmedabad City in Special Criminal Case No.33 of 1989 is set aside. The appellant

is acquitted of all the charges levelled against him and he is ordered to be set at liberty forthwith, if not required in any other case. Bail bond of the accused-appellant stands cancelled.

(C.K.BUCH, J.)

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